

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, PETITIONER

v.

NEIFERT-WHITE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent contends that this case does not come within the purpose of the False Claims Act because the false statements were made in connection with applications for loans which were required by regulation to be adequately secured. Therefore, the argument runs, no possibility of loss to the government was involved. It is, of course, irrelevant that no measurable loss was sustained; it has long been recognized that the provision in the False Claims Act for a liquidated sum for each false claim, in addition

to recovery of double the provable damages, was designed to insure recovery even in the absence of provable damages. See, e.g., *Rex Trailer v. United States*, 350 U.S. 148, 152-3 n. 5; *United States v. Ridglea State Bank*, 357 F. 2d 495, 499 (C.A. 5); *Toepleman v. United States*, 263 F. 2d 697, 698-9 (C.A. 4), certiorari denied *sub nom. Cato Bros. v. United States*, 359 U.S. 989. Nor is it correct to say that a loan obtained by a false statement involves none of the potentiality of loss against which the False Claims Act was designed to afford protection. Here, the false statements in the loan applications as to the purchase price of the assets which were to serve as security for the loans were intended to cause the government to overvalue the security. Moreover a false statement which results in the making of a loan for a sum greater than the amount that could be granted if the true facts were known does result in at least a temporary loss, since the government moneys are applied to unauthorized uses. Even in the case of a loan which is repaid, the borrower has received a subsidy where, as here, the interest rate is below the rate which would be charged in the open market.¹

We also note that the claim-of-right doctrine laid down by the court below has no relation to the risk of loss to which a false statement subjects the government. The risk of loss resulting from fraud in a loan application would depend on the borrower's solvency,

¹ Under the then-existing regulations, the interest charged was four per cent per annum. Section 474.726(c), 23 F.R. 9688. Commercial lending rates would doubtless have been higher. Federal Reserve Bulletin (January, 1960), at 49.

the adequacy of the security, and the rate of interest. However, the rule established by the court below would make the False Claims Act inapplicable to any loan application—even if there was in fact no existing security. Furthermore, the approach adopted by the court below is not limited to loans: it would also apply to the many federal subsidy programs where the grant is a matter of administrative discretion rather than legal right. Obviously, the grant of a subsidy to an ineligible recipient, or in an unauthorized amount, causes loss to the government: grant-in-aid funds—whether or not the recipients of the grants have a legal claim—“are as much in need of protection from fraudulent claims as any other federal money.” *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544.

2. Respondent refers to the fact that criminal statutes proscribe both false “claims” (18 U.S.C. 287) and false “statements” (18 U.S.C. 1001), and implies that the government’s position here would obliterate the statutory distinction between “claims” and “statements”. However, there are countless “statements” made to government agencies which are not “claims” within the civil provisions of the False Claims Act, either because they do not call for immediate transfer of government funds or property (such as an application for a loan guaranty),² or because the government’s only interest is regulatory in na-

² *United States v. McNinch*, 356 U.S. 595, held an application for FHA credit insurance not to be a “claim” under the civil provisions of the False Claims Act.

ture.³ Thus, there are numerous cases applying 18 U.S.C. 1001 to false "statements" which are clearly not "claims": *United States v. Gilliland*, 312 U.S. 86 (reports under "Hot Oil" Act regarding production and handling of petroleum products); *United States v. Zavala*, 139 F. 2d 830 (C.A. 2) (customs declaration); *United States v. Leviton*, 193 F. 2d 848 (C.A. 2), certiorari denied, 343 U.S. 946 (shipper's export declaration); *United States v. Wright*, 48 F. Supp. 687 (D. Del.) (application for ration book); *United States v. Goldsmith*, 108 F. 2d 917 (C.A. 2), certiorari denied, 309 U.S. 678 (application for immigration visa); *Cohen v. United States*, 201 F. 2d 386 (C.A. 9), certiorari denied, 345 U.S. 951 (taxpayer's financial statement submitted in course of investigation of income tax liability); *Blake v. United States*, 323 F. 2d 245 (C.A. 8) (application for federal employment); *United States v. Salazar*, 293 F. 2d 442 (C.A. 2) (signing false name to civil service examination); *Frasier v. United States*, 267 F. 2d 62 (C.A. 1) (statement in Armed Forces Loyalty Certificate); *United States v. Van Valkenburg*, 157 F. Supp. 599 (D. Alaska) (statement made to United States Attorney to induce action against a third person).

Clearly, then, recognition that the False Claims Act reaches every claim for immediate transfer of gov-

³ *United States v. Gilliland*, 312 U.S. 86, held that the prescription of false "statements", now set forth in 18 U.S.C. 1001, applies where the government's sole interest is regulatory, specifically rejecting the argument that it applies only "to matters in which the Government has some financial or proprietary interest." 312 U.S. at 91.

ernment money or property leaves untouched by the Act innumerable frauds on the government. There is accordingly no inconsistency with this Court's statement "that the False Claims Act was not designed to reach every kind of fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599.

3. Respondent's discussion of the various changes in the False Claims Act since its original passage (Brief, pp. 20-26) adds nothing to the case. The 1873 revision made no change pertinent here, and does not detract from the relevance of the legislative history of the original Act.⁴ Nor is respondent's discussion (Brief, pp. 22-25) of the 1918 amendment to the criminal provisions of the False Claims Act, and

⁴ As respondent notes, Section 5438 of the 1873 Revised Statutes eliminated the original provision forbidding the forgery of any signature on any bill, receipt, voucher, etc. However, this provision had applied in the original Act only where the forgery was in connection with a "false, fraudulent, or fictitious claim." 12 Stat. 697. Thus, whatever the purpose of the change, it did not affect the original requirement that there be a "claim." The Chairman of the House Committee on the Revision of the Laws stated to the House that in the 1873 revision "the committee have endeavored to have this revision a perfect reflex of the existing national statutes": in response to a question from the floor "whether there will be anything in this revision of the laws that we have not already in the Statutes at Large?", the Chairman answered "Nothing; at least we do not intend there shall be." 2 Cong. Rec. 129 (Rep. Poland) (December 10, 1873). The revisers may well have thought that the eliminated provision came within the second clause of Section 5438, proscribing the making or using, in connection with a false claim, of any false bill, receipt, voucher, etc., knowing it to contain "any fraudulent or fictitious statement or entry."

the 1948 codification of these provisions, relevant here. As this Court recognized in *Rainwater v. United States*, 356 U.S. 590, 592-3, the civil provision of the False Claims Act incorporates the criminal provisions as set out in the 1878 Revised Statutes; subsequent amendments are irrelevant.

Respectfully submitted.

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JANUARY 1968.

